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THE JOHN F. SONNETT MEMORIAL LECTURE

THE SECRET LIFE OF JUDGES

*Dennis Jacobs**

Dean Treanor, distinguished faculty, students, alumni, colleagues, and fellow friends of Fordham Law School, I am honored more than I can say to be invited to deliver this distinguished lecture in the post-centennial year of this great law school—now, this venerable law school. I am going to express my gratitude by saying some things that matter to me, that are not often said, and that distill observations that have (increasingly) bemused me over the fourteen years that I have been a judge.

The title of my lecture gives little clue, I suspect, as to what I am going to say; but it is not a tease. I am going to talk about "The Secret Life of Judges," by which I mean a habit of mind that, among so many admirable features of the judicial mentality, amounts to a serious and secret bias. There is a social reluctance to talk about this kind of thing. It sounds sanctimonious. Then again, a neat thing about giving a lecture is that it disarms inhibitions about lecturing people. I get to be sanctimonious without worrying about it.

This lecture is about bias, the judge's inbred preference for outcomes controlled by proceduralism, the adversary system, hearings and experts, representation by lawyers, ramified complexity of doctrines and rules, multiple prongs, and all things that need and use lawyers, enrich them, and empower them vis-à-vis other sources of power and wisdom.

Let me make this bias concrete by example. If you arrived in an appellate court as counsel for a medical-malpractice plaintiff, and the three individuals on the bench were wearing white coats instead of black robes and had stethoscopes around their necks, I think your heart would sink. I could tell you that the three doctors deciding your case have taken an oath to be impartial as between patients and the medical profession and that they are conscientious, decent individuals who take seriously the obligation to be neutral. You would not be reassured: You would understand that there is (at least) an internalized bias that the doctors would not acknowledge because they would not notice it. A similar dread would come over the

* Chief Judge, United States Court of Appeals for the Second Circuit. These remarks were made on November 20, 2006, at the 2006 John F. Sonnett Memorial Lecture held at Fordham University School of Law. This transcript of Chief Judge Jacobs's remarks has been lightly edited.

defendant's lawyer if the three judges each had a limb suspended in traction.

In our courts, judges are lawyers. They are all lawyers. Most of us have never been, nor want to be, anything else. We are proud of being lawyers. For many of us (like myself), lawyering is our only talent (assuming we have any talent at all), and it is the source of as much esteem as we enjoy. Our calling says a lot about how our minds work, what we respect, and whom we trust.

I am not—I repeat, I am not—speaking about a bias based upon politics or agenda, economic class, ethnicity, or para-ethnicity. When I refer to the secret life of judges, I am speaking of an inner turn of mind that favors, empowers, and enables our profession and our brothers and sisters at the bar. It is secret, because it is unobserved and therefore unrestrained—by the judges themselves or by the legal community that so closely surrounds and nurtures us. It is an ambient bias.

The result is the incremental preference for the lawyered solution, the fee-paid intervention or pro bono project, the lawyer-driven procedure, the appellate dispensation—and the confidence and faith that these things produce the best results. It is an insidious bias, because it is hard to make out, in the vast maze of judicial work and outcomes, the statutes, doctrines, and precedents that are woven together like an elaborate oriental rug in which the underlying image of the dragon emerges only after you stare for a while. I discern in this jumble a bias in favor of the bar and lawyers: what they do; how they do it; and how they prosper in goods and influence. This is the "figure in the carpet."[1]

This bias has several effects and ramifications. Judges all too frequently frame legal doctrines without considering the litigants' transaction costs. Considering how many of us conscientiously think hard about the economic consequences of the outcomes we adopt, it seems strange that our cases reflect an almost complete disregard and ignorance of the costs, uncertainties, and delays inflicted by the judicial process itself. I think that is because judges as lawyers cannot see as a problem the activity and busyness from which our brothers and sisters at the bar draw their livelihood, their career advancement, their distinction, and (often) their sense of purpose in life. All of this depends on the ceaseless turning of the legal machine.

Judges tend to assume that the adversary process assures a fair fight and a just outcome. And judges work hard to be fair as between the adversarial positions presented. But almost always, the adversaries on all sides are lawyers; so adversariness is no great engine for assuring fairness when it comes to the allocation of decision-making power between lawyers (adversaries all) and the institutions and populations outside our profession. The result is not that lawyers and the legal profession always win in court

1. *See* Henry James, *The Figure in the Carpet*, *reprinted in* The Figure in the Carpet and Other Stories (Frank Kermode ed., Penguin Books 1986).

contests (even though they are on both sides); but, there is no doubt that they get to punch above their weight.

As I hope I have made clear, I am talking about altruistic litigation as well as hourly fee-paid work and work on contingency. For all the good that public interest lawyers do (and it is a great deal), some of it results in the short circuit of democratic decision making and coerced policy choices. Thus, the threat of litigation often compels school boards to suppress all orthodoxies except those endorsed by the cadres of constitutional lawyers and constitutional law professors. A school-board member exercising fiduciary duties will bow to anticipated demands rather than bear the cost of exercising or testing the board's own rights, if only because the cost of litigating a flag, a reference to God, a locker search, a dirty word, or something like that, can easily cost the school board the annual services of a music teacher or a teacher of remedial reading.

To my observation, judges are blind to this. I think that is because public interest litigation greatly enhances lawyer influence and—not at all incidentally—increases the influence and power of judges. Judges love these kinds of cases. Public interest cases afford a judge sway over public policy, enhance the judicial role, make the judge more conspicuous, and keep the law clerks happy.

Whether fee-paid or pro bono publico, when lawyers present big issues to the courts, the judges receive the big issues with grateful hands; the bar patrols against inroads on jurisdiction and independence and praises the expansion of legal authority; and together we smugly congratulate ourselves on expanding what we are pleased to call the rule of law.

Among the results are the displacement of legislative and executive power, the subordination of other disciplines and professions, and the reduction of whole enterprises and industries to damages. Examples come ready to hand, though, speaking as I do as a judge, I am constrained from citing specifics of controversies that may come before me. In generalities, let me observe,

- Judicial power over the legislature and the executive is dilated by constitutional litigation, much of which is lawyer-driven. Often, the plaintiff's standing is made to rest on largely notional, abstract harms (like annoyance or anxiety), and sometimes the existence of the plaintiff is a recruitment detail that is easily arranged.

- Through such constitutional litigation, judges get to direct the work of educators, police, child protection officers, and many other professionals who have training to discharge critical responsibilities that require their expertise and experience.

- Class actions and consent decrees allow judges to operate prisons and schools, to force appropriations, and to channel funds.

- In mass tort, judges hold in their hands the fate of vast enterprises and can cause their extinction, with capitalization

> forfeit to distribution between lawyers and plaintiffs and workers let go.

Judges who issue expansive rulings in these spheres enjoy wide esteem and reputation. There are judges whose fine reputations rest in part on the ability to handle and administer innumerable claims through litigation and settlement, pretty much without regard to whether the claims themselves are based on fraud, corrupt experts, perjury, and other things that would be deplored and persecuted by the legal profession if done within other commercial fields.[2]

The broadest judicial bias I see, and the one I will describe most vaguely, is the bias in favor of legal complexity. The volumes of the third edition of the Federal Reporter spread themselves like kudzu vine over the shelves of law libraries. I will offer no example, because I would be honor-bound to cite myself as a chief offender, but it is a problem when the complexity of the law causes laymen to view the legal process as either political or as essentially random. This phenomenon is made visible in the papers of pro se litigants, who rarely bother to read the trial court decisions that reject their claims, and proceed to appeal on the theory (perhaps not altogether misguided) that the sheer, ramified, sprawling patterns of law will (in the hands of the right judge) yield a substantial payment or a sweet revenge.

It is an observed fact that the complexity of doctrines and opinions (not to mention the discovery of new doctrines) evokes praise and respect from within the profession. But our highly ramified litigation system imposes vast costs on other fields of endeavor, on our democratic freedoms, and on the unrepresented and the non-litigious.

The law reviews seem to have exhausted all topics dealing with bias in the law and the ethics and infractions of other professions. I asked one of my law clerks to check to see how many articles have dealt with the bias of judges toward the dominance and control of the legal profession, and my clerk came up dry.[3] That does not surprise me, because if judges have this unconscious bias, so (I think) do law professors, for the same reasons—and students, for the same (and other) reasons. Scholarly papers undertake to expose and demonstrate the institutional and cultural biases of the law in every direction but this one. It is not for me to say whether I am making the point of this lecture effectively; but at least I can say that the competition is thin.

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2. This point has been made in the asbestos context. *See, e.g.*, Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833, 911 (2005) ("[T]he pervasiveness of the absence of application of ethical rules to asbestos litigation and to a large extent, to asbestos bankruptcy proceedings as well, can only stand as an indictment of the courts, disciplinary authorities and indeed, the legal profession."); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L. Rev. 33, 37 (2003).

3. Subsequent to this Lecture, Professor Benjamin Barton has posted a paper that discusses this bias. *See* Benjamin H. Barton, Do Judges Systematically Favor the Interests of the Legal Profession? (Apr. 3, 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976478

Why do we not notice this bias that I am talking about? If you are with me so far, and you now agree (or started out believing) that judges have a bias in favor of legalism and the legal profession, you may wonder as I have, why it is not noticed. Actually, it is a very familiar phenomenon that we do not recognize our bias as such. One tends to assume that bias has a nasty face, and that decent people shrink away instinctively. But some forms of bias are culturally embedded and are exercised with popular or elite approval.

Bias is not a moral evil. Everyone feels tugs of loyalty; everyone should. The bias I am talking about is more finely characterized as a tropism, an instinctive turning to follow a source of vital energy. That is what the sunflower does. But it is one thing to turn to follow the sun, and it is another to follow the American Bar Association (ABA), the law schools, law clerks, and the sound of applause.

Judges are susceptible to the opinions of others in our profession. But the bias in favor of more law, more procedure, and more process is in great measure bred in the bone of a lawyer. A judge is trained in the law; virtually all of us have high self-approval and a high regard for our profession, its processes, its culture and values, and its judgments—the profession which (after all) did loft judges to the bench, where we presumably wanted to go.

The tropism in favor of what lawyers do, and our tendency to expand the spheres of activity in which lawyers act and control, comes clothed in virtue. It is seen by us mainly as respect for due process, as the open door of the courthouse, as a flowering of the rule of law—and so excesses are viewed with indulgence as a Tocquevillian quirk of the American character. But it is unbecoming for judges to dismiss this phenomenon. It matters that our conduct as judges is reinforced by the support and praise that we get from colleagues, lawyers, bar associations, and law schools. I think fair-minded people should recognize the dangers that arise when judges, as the final arbiters for allocating vast power, money, and influence, are all members of the same (self-regulating) profession—and often of the same professional groups and social environments. It is a matter of like calling unto like.

Judges adhere to tight ethical constraints that keep us honest in that way and to that degree; but (ironically) some of those same constraints tend to reinforce our professional bias by insulating us from the influences of politics and (non-law) commerce. Unless we make an effort, we can become disconnected from the values and perceptions of the larger public. The more we obey the constraints that isolate us within a circle of legal culture, the more we are left to be judged, evaluated, and flattered (or not) by the nourishing, attentive, knowledgeable circle of lawyers, law students, and professors—which (to make matters worse) includes often the most charming and scintillating people in the community.

The mystique of the judicial process, and its power and pretension in this country, is pretty much all based on the idea of neutrality. If that idea is

deflated, by puncture or slow leak, it is bad for judges and for the larger community. Our work is subject to hostile critiques; and, if we do not acknowledge and restrain our bias, others will notice, and forces will marshal to rein us in.

These critiques are often classified as attacks on judicial independence, and resisted as interference, or dismissed as ignorant. Thus, a great theme of the legal profession is emphatic support for judicial independence. That is a good thing, and I enjoy my independence as much as the next judge; but judges should consider and appreciate that one effect (maybe a motive) of the bar's avid support of judicial independence is to make judges "independent" of many influences (good and bad) that compete with the dominant influence over judges that is exerted by fellow lawyers, bar associations, and law professors. This support of judicial power by the bar may be a pillar of law, but it can also operate as group loyalty, the protection of turf, or a reciprocal commitment to the ascendency of judges and lawyers.

This bias I am talking about keeps us from seeing obvious things. For example, bar associations nowadays are chiefly trade groups. It is naive to think that the legal profession is the only disinterested player in our economic life. And bar groups are highly political. The ABA has formally adopted and announced hundreds of positions on virtually every issue in political dispute: You can look them up. It lobbies for those views in legislatures; it promotes them in amicus briefs filed in the courts. Yet hundreds of federal judges are members; thousands in the state and local courts. The canons of judicial conduct[4] make space for that anomaly.

The canons broadly warn that "[a] judge should refrain from political activity."[5] But the same canon (7) has a proviso: "this should not prevent a judge from engaging in the activities described in Canon 4,"[6] which says that "[a] judge may serve as a member, officer, or director of an organization . . . devoted to the improvement of the law."[7] And the commentary positively "encourage[s]" a judge to "contribute to the improvement of the law" by various means, expressly including "through a bar association."[8] Hospitably, the commentary allows a judge to "receive as a gift travel expense reimbursement including the cost of transportation, lodging, and meals, for the judge and a relative incident to the judge's attendance at a bar-related function."[9]

The legal profession, like all other fields, should be able to tap the experience and wisdom of its leading members, judges among them. And

4. Code of Conduct for United States Judges (2000), *available at* http://www.uscourts.gov/guide/vol2/ch1.html.

5. *Id.* Canon 7.

6. *Id.* Canon 7C.

7. *Id.* Canon 4C.

8. *Id.* Canon 4 cmt.

9. *Id.* Canon 5C(4) cmt.

there are times and places for that; at one time, the organized bar may have been such a forum. But now?

Judges who are members of the ABA are technically in an auxiliary for judges in which they presumably participate in the development of legal ideas. But allowing judges to join a trade association so that they can collaborate with the membership in developing the law seems to me to make matters much worse rather than better. In any event, the expedient of a judges' auxiliary would not be tolerated in any other ethical context. If there were a judges' auxiliary to the American Bankers Association or the Brotherhood of Pharmaceutical Manufacturers, I am sure they would love to have us, and would happily work with us on shaping legal improvements. What if there were a judges' auxiliary to the Tobacco Institute or the American Insurance Association that paid my way to their conventions (with my relative), where I could work with them shoulder to shoulder on beneficial improvements in the law? Why assume that the improvements favored by the ABA are less self-serving than the improvements favored by other professional and trade groups?

When the ABA considers improvements in the law, it usually comes down on the side of punitive damages, attorney's fees, the expansion of causes of action, and new areas of regulation that require maintenance by lawyers (such as speech at election time). I do not claim to be any better than the next one, but I would be uncomfortable being a guest of the ABA on well-oiled occasions when such improvements are discussed. All of this is made worse by the fact that the ABA often litigates as amicus curiae (and I will pass over without comment the ABA's evaluation of judicial nominees).

Of course, judges should be involved in the development of the law—case by case, chiefly. No doubt, judges also read some books, go to debates and forums, and attend seminars. But the idea that judges will develop the law under the sponsorship and aegis of a powerful interest group should provoke disquiet—and would, but for the fact that (with some notable exceptions) judges do not see this as an issue.

I sometimes think that the problem at bottom is really a lack of respect by lawyers for other people. Judges live chiefly in a circle of lawyers. Our colleagues are lawyers; happily, our friends are lawyers (and I am hoping to keep some after this lecture); the only outside income a federal judge can earn (aside from royalties) is from teaching in law schools (with the idea, I suppose, that they furnish a nonpartisan environment); and the only political and trade organizations we can join are bar associations.

But outside that circle there are people who are just as fully absorbed by other pursuits that deserve consideration and respect. Judges need a heightened respect for how nonlawyers solve problems, reach compromises, broker risks, and govern themselves and their institutions. There are lawyers on the one hand; and just about everybody else is the competition in the framing of values and standards of behavior.

In that competition, judicial bias has eroded the independence and influence of doctors, medical administrators, insurance underwriters, engineers, manufacturers, the military, the police, wardens and corrections officers, the clergy, employers, and teachers and principals.

I think that judges ought to appreciate that they operate under an internalized conflict of interest when they deal with all of these categories of people, and others, and that (as someone observed) divided loyalties are rarely divided down the middle. There is a great danger that, by the subordination of other professions, callings, and centers of power (and of their judgment and discretion), we are losing indispensable influences.

Another consequence of biased vision is the assumption that if something is of great importance, it can be safely left to lawyers. That is fine when it comes to statutory interpretation and such, but lawyers lack humility in approaching great matters. As judges, we tend to assume that adversarial hearings and expert testimony will render the judge omni-competent and fit to decide the great questions, and that a legal mind is the highest and most useful development of mental capacity.

The mind-set is that if something is of great importance—such as speech, thought, and expression; race, identity, and sexuality; life and death—it cannot be safely and properly left chiefly to anyone else. How else does one account for the fixation on issues such as capital punishment and the right to die, given that capital punishment cases are few (at least in these parts), and that death is coming for us as a certainty, regardless of whether we classify it as an entitlement? As we exercise power over all the basic, ultimate, and transcendent things, I think that judges should consider how we inevitably diminish the influence of doctors and juries, clergy and social workers, legislatures, and the ordinary citizen.

The legal mind is indispensable to lawyering, and for other purposes it is perfectly okay in its way. But it has its limitations. For example, every problem-solving profession—except ours—quickly adopts as preferred the solution that is simplest, cheapest, and most efficacious, or (as they say) elegant. Also, our legal mind is invasive: It has institutional advantages for subordinating other modalities of thought, and it presses those advantages. And it is triumphalist about its expansions of influence. The uninitiated, who lack the legal mind, are harnessed to our purposes as jurors or are put to the margins. What nonlegal professionals think can be dismissed as arbitrary and capricious, or (if needed to assist the legal process) can be classified as expert opinion, to be weighed by us and by our standards.

The legal mind can hold its own with the competition in terms of rigor; I have one, and I make no apology for it. But at least I have come to admit that, depending on the question, the legal mind may be insufficient or may be inferior to the moral imagination; the scientific method; the practical arts of healing, politics, and entrepreneurship; the promptings of loyalty, faith, and patriotism; and the experience and expertise found elsewhere and among others.

If you are not with me this far, you will have little interest in this last question: What can be done to correct this bias and to place the legal profession again on a footing of parity and fair competition with other professionals and activities that have a right to influence in our communities and our culture? In a nutshell, judges should lead the bar in exercising the self-restraint and self-discipline that is incumbent on a profession that has a virtual monopoly on legislative power and a monopoly by patent on the power of the judiciary, and that is largely self-regulating.

Other professions, by ethics or honor, exert the imagination and self-possession to avoid exercising all the power they have. Let me give an incendiary example.

When a military force occupies a conquered province, the military has vast power and may be tempted to run things in a way that best serves the dominance and comfort of the military profession. A military solution can be found for every challenge; such solutions fit the salient talents and skill-sets of military commanders. No doubt it is of the greatest convenience to the military and a great comfort to them to impose early curfews; to censor letters; to close the outspoken newspapers and the satirical magazines; to take over the radio, the police, and the prisons; to shoot looters; to draft strikers; to favor military justice; and to commandeer all the better hotels. I think there is a natural temptation for the military officers in charge to do all these things because these are measures that subordinate a lot of conduct that undermines military administration, and because no doubt lifelong professional military officers might believe that these measures are effective and fair and constitute the best design for the organization of the society under their thumbs. Others in the military might applaud the tidy administration that results.

We (in the profession of law) recoil from such measures in part because it is not our profession; it does not fit our salient talents and skill-sets; it puts to the margin what we do and the sphere in which we operate; and so we lack faith in it. It seems to us, viscerally illegitimate.

But an enlightened military recognizes that imposition of all these measures on an ongoing or permanent basis improperly subordinates other spheres of life. The military types (I am not one) seem to control themselves through a concept of honor. Maybe judges should consider their example. I concede that a country could do worse than suffer rule by lawyers: I would prefer a tyranny of law to life under a military regime. But outside our professional sphere, the dominance of the legal profession and the judiciary is resented more than we appreciate.

As a matter of self-awareness and conscience, judges should accept that the legal mind is not the best policy instrument, and that lawyer-driven processes and lawyer-centered solutions can be unwise, insufficient, and unjust, even if our friends and colleagues in the legal profession lead us that way. For the judiciary, this would mean a reduced role, *but not a diminished one* if the judiciary is elevated by considerations of honor, self-restraint, and respect for other influences.